UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STACY SANCHEZ and NIKISHA OBERMULLER, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-v-

GANSEVOORT MANAGEMENT GROUP, INC., and CARLTON NOEL CAMPBELL,

Defendants.

12 Civ. 75 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

On January 5, 2012, plaintiff Stacy Sanchez brought this action against defendants Gansevoort Management Group Inc. and Carlton Noel Campbell for violations of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219, and New York Labor Laws, N.Y.L.L. § 195, N.Y.C.R.R. § 142-2. (See Compl., ECF No. 1.) The action was reassigned to the undersigned on October 4, 2012.

On November 8, 2012, plaintiff Sanchez, along with plaintiff Nikisha Obermuller, filed an amended complaint against the same defendants alleging substantially similar claims, and adding a claim for "breach of contract, unjust enrichment and quantum meruit." (See Am. Compl., ECF

No. 28.) The amended complaint clarified that plaintiffs seek legal redress in connection with their work for defendants as fire guards. (See id. ¶¶ 14-15.)

On November 21, 2012, plaintiffs moved to conditionally certify this matter as a collective action under 29 U.S.C. § 216(b). For the reasons that follow, plaintiffs' motion is GRANTED, subject to the modifications to its proposed form of notice imposed by the Court.

DISCUSSION

Section 216(b) of the FLSA authorizes employees to maintain collective actions where they are "similarly situated" with respect to the alleged violations of the FLSA. 29 U.S.C. § 216(b); Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010). Similarly situated employees must "opt in" to an action by filing a "consent in writing to become . . . a party." 29 U.S.C. § 216(b).

Certification of a "collective action" is a two-step process in the Second Circuit. See Myers, 624 F.3d at 554–55. At the first step (conditional certification), the Court simply authorizes notice to be sent to potential similarly situated plaintiffs. Id. at 555. Plaintiffs bear the light burden of making a "modest factual showing" that the named initial plaintiff(s) and the potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." Id. (quoting Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997)). The burden may be satisfied through the pleadings and affidavits alone. Iglesias-Mendoza v. La Bell Farm, Inc., 239 F.R.D. 363, 367 (S.D.N.Y. 2007).

At the second step, defendants have the opportunity to move for decertification if, after additional discovery, the record shows that the opt-in plaintiffs are not, in fact, similarly situated to the named plaintiff(s). See Myers, 624 F.3d at 555.

Here, plaintiffs have satisfied the light burden they bear at the first stage of certification. They allege, among other things, that defendants (1) failed to pay them overtime premiums, (2) failed to properly calculate overtime, and (3) failed to pay the applicable minimum wage. (See Am. Compl. ¶¶ 16-26, 31, ECF No. 28.) Plaintiff Sanchez also submitted an affidavit in support of this motion. (Sanchez Aff. ¶ 1, ECF No. 31.) In the affidavit, Sanchez swears to have observed "other employees who performed the same job duties that [Sanchez] performed." (Id. ¶ 2.) Sanchez also swears to have knowledge that those other employees worked more than forty hours per week but were not separately paid an overtime premium. (Id. ¶¶ 3-4.) Because the pleadings and the affidavit, taken together, suggest a common policy of failing to pay required overtime premiums, that showing suffices for conditional certification.[1]

[1] Defendants' affidavit from Carlton Campbell opposing certification as a collective action does not alter this conclusion. That affidavit speaks largely to the merits of plaintiffs' claims rather than the propriety of certification. (Campbell Aff., ECF No. 33.) And to the extent it contradicts statements sworn to by the plaintiffs, the Court will grant the plaintiffs the benefit of the doubt given the posture of this motion. See, e.g., Salomon v. Adderley Indus., Inc., 847 F. Supp. 2d 561, 565 (S.D.N.Y. 2012).

Nevertheless, the affidavit does not suffice to conditionally certify the entirety of plaintiffs' proposed collective action. In particular, it does not speak to a common policy or practice of failing to pay the applicable minimum wage. The unverified amended complaint does not, standing alone, suffice to conditionally certify a class on that basis.

The Court notes that, while plaintiff's affidavit is relatively sparse with facts, defendants have put forth no reason to suggest that defendant's employees who claim not to have been paid their required overtime premiums should not be able to litigate their claims collectively. In this way, the instant motion differs from cases where courts have denied conditional certification in the face of minimalist supporting affidavits. See, e.g., Flores v. Osaka Health Spa, Inc., No. 05 Civ. 962, 2006 WL 695675 (S.D.N.Y. Mar. 16, 2006); Levinson v. Primedia Inc., 02 Civ. 2222, 2003 WL 22533428 (S.D.N.Y. Nov. 6, 2003).

Accordingly, the Court hereby conditionally certifies a collective action of all current and former employees of defendants who allege not to have been paid overtime premiums to which they were legally entitled under the FLSA. Should facts develop suggesting that any opt-in plaintiffs are not similarly situated, defendants may move for decertification at that time.

CONCLUSION

In light of the above discussion, plaintiff's motion for conditional certification of a collective action is GRANTED except to the extent that plaintiffs shall amend their proposed notice to reflect the changes indicated by the Court on the attached proposed notice form.

IT IS FURTHER ORDERED that within one week of the date of this Order, defendants shall provide plaintiffs with an excel document including the names, titles, period of employment, last known mailing addresses, any alternative addresses, all known telephone numbers, and the primary language of all covered employees.

The Clerk of Court is directed to terminate the motion at Docket No. 29.

SO ORDERED:

Dated: New York, New York
January 10, 2013

K. B. Forrest

KATHERINE B. FORREST
United States District Judge

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

NIKISHA OBERMULLER and STACY SANCHEZ, individually and on behalf of all other persons similarly situated,

Plaintiffs,

–against–

GANSEVOORT MANAGEMENT GROUP INC. and CARLTON NOEL CAMPBELL, jointly and severally,

Defendants.

12 CV 75 (KBF)

NOTICE OF COLLECTIVE ACTION LAWSUIT

This notice is to tell you about a lawsuit against your current or former employer, advise you of how your rights may be affected by this lawsuit, and instruct you how to participate in this lawsuit if you choose.

This notice is not an expression by the Court of any opinion as to the merits of any claims or defenses asserted by any party to this action. As described more fully below, if you are eligible and wish to participate in this collective action, you must timely complete and submit the Consent to Become a Party Plaintiff form attached to this notice.

DESCRIPTION OF THE LAWSUIT

On January 5, 2012, Stacy Sanchez commenced a lawsuit and, on November 8, 2012, a first amended complaint was filed by Nikisha Obermuller and Stacy Sanchez ("named plaintiffs") in the United States District Court for the Southern District of New York against Gansevoort Management Group Inc., and its owners and managers (hereinafter "Gansevoort").

The lawsuit alleges that Gansevoort failed to pay its workers overtime pay to which they were entitled under the Fair Labor Standards Act ("FLSA"), and seeks to have Gansevoort pay the amounts that are owed, if any, plus liquidated damages. (The lawsuit also seeks attorneys' fees and costs.)

Gansevoort denies that it violated the law, that it owes any employee any additional compensation, and that it owes liquidated damages.

WHO CAN JOIN

This lawsuit is a collective action, meaning the named plaintiffs have brought it on behalf of the named plaintiffs and anyone similarly situated. Gansevoort identified you to the Court as a person who may be similarly situated.

You may be eligible to join this lawsuit if you were employed by Gansevoort any time since [three years before the mailing date of the notice] and, during that time, you worked over forty hours in any workweek and ~~either (1) Gansevoort did not pay you for all the hours you worked for Gansevoort, or (2)~~ Gansevoort did not pay you overtime compensation in the amount of one and one-half your hourly rate of pay for all hours you worked for Gansevoort in excess of forty hours per workweek. KBF

You may join the lawsuit regardless of your immigration situation or authorization to work, now or during the time you were employed.

If you have questions about whether you are eligible to join the lawsuit, you may contact the named plaintiffs' attorneys. The named plaintiffs' attorneys' contact information is at the end of this notice. If you choose, you may also obtain and consult your own attorney.

HOW TO JOIN THIS LAWSUIT

If you are eligible, you may join the FLSA portion of this lawsuit by completing, signing, and dating the enclosed form entitled Consent to Become a Party Plaintiff and mailing it to the named plaintiffs' attorneys at this address:

Law Office of Justin A. Zeller, P.C.
277 BROADWAY STE 408
NEW YORK NY 10007-2036

You may also fax it to 1-212-229-2246 or scan and email it to jazeller@zellerlegal.com.

Your Consent to Become a Party Plaintiff must be either postmarked or received by the named plaintiffs' attorneys by [~~seventy-five~~ forty-five KBF **days after the mailing date of the notice]**. If you do not timely return the form, the Court may not allow you to participate in this lawsuit.

You have the right to retain another attorney to represent you in any FLSA claim against Gansevoort. There is a two year deadline (or three years if the FLSA violation was willful) for bringing a claim, running from the date the violation occurred. KBF If you choose to retain another attorney or to represent yourself, you may submit an appropriate consent form directly to the Clerk of the Court of the United States District Court for the Southern District of New York.

If you know of any other person who may be eligible to join this lawsuit, you may share this notice with that person or contact the named plaintiffs' attorneys.

EFFECT OF JOINING THIS LAWSUIT

If you choose to join in this lawsuit, you will be bound by the decision of the Court, whether favorable or unfavorable.

If you choose to join in the lawsuit, you may be asked to appear for a deposition, respond to discovery requests, and appear at a trial.

The named plaintiffs' attorneys are being paid on a contingency basis, which means that if there is no recovery there will be no attorneys' fees owed. Under this agreement, if there is a settlement or if there is a trial and the plaintiff prevails, the plaintiff's attorneys are entitled to 40% of the amount as legal fees or the actual value of the time the attorneys spend on the case as approved by the Court. You can obtain a copy of the contingency fee agreement executed by the named plaintiffs upon request to the named plaintiffs' attorneys.

If you return the Consent to Become Party Plaintiff attached to this notice, you are agreeing to designate the named plaintiff and the named plaintiffs' attorneys to make decisions on your behalf concerning this lawsuit, the method and manner of conducting this lawsuit, the entering of an agreement with the named plaintiffs' attorneys concerning attorneys' fees and costs, and all other matters pertaining to this lawsuit. These decisions and agreements made and entered into by the named plaintiffs' attorneys will be binding on you if you join this lawsuit. However, the Court will determine the reasonableness of any settlement with the defendants, if any, and any agreement concerning the reasonableness of attorneys' fees and costs that are to be paid to the named plaintiffs' attorneys.

EFFECT OF NOT JOINING THIS LAWSUIT

If you choose not to join this lawsuit, you will not be affected by any judgment or settlement, if any, rendered in the FLSA portion of this lawsuit, whether favorable or unfavorable. If you choose not to join in this lawsuit, you may file your own lawsuit under the FLSA.

RETALIATION UNLAWFUL

It is a violation of federal law to in any manner discriminate or retaliate against you for participating in this lawsuit. If you believe you have been retaliated or discriminated against in any manner as a consequence of your receiving this notice, considering whether to join this lawsuit, or joining this lawsuit, you should contact the named plaintiffs' attorneys or any attorney of your choosing.

FURTHER INFORMATION

Further information about this notice or the lawsuit may be obtained from the named plaintiffs' attorneys:

Law Office of Justin A. Zeller, P.C.
277 BROADWAY STE 408
NEW YORK NY 10007-2036
1-212-229-2249

Gottlieb & Associates
150 E 18TH ST PH R
NEW YORK, NY 10003-2461
1-212-228-9795

This notice has been approved and authorized by the Honorable Hon. Katherine B. Forrest, United States District Judge. However, the Court has taken no position regarding the merits of the plaintiff's case or of the defendant's defenses.

[date of mailing]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

NIKISHA OBERMULLER and STACY SANCHEZ, individually and on behalf of all other persons similarly situated,

Plaintiffs,

–against–

GANSEVOORT MANAGEMENT GROUP INC. and CARLTON NOEL CAMPBELL, jointly and severally,

Defendants.

12 CV 75 (KBF)

CONSENT TO BECOME A PARTY PLAINTIFF

I consent to become a party plaintiff in this lawsuit. I hereby designate the Law Office of Justin A. Zeller, P.C., the named plaintiffs' attorneys, as my attorneys in this case with respect to any claims I may have under the Fair Labor Standards Act.

I understand that Nikisha Obermuller and Stacy Sanchez, the named plaintiffs, and the Law Office of Justin A. Zeller, P.C., the named plaintiffs' attorneys, are my representatives to make decisions on my behalf concerning this litigation, the method and manner of conducting this litigation, the entering of an agreement with the named plaintiffs' attorneys concerning attorneys' fees and costs, and all other matters pertaining to this lawsuit.

Date: ______________________ ______________________________
(signature)

Name: ______________________________

Address: ____

____

Telephone number: (_____) _____-_______